IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0366-17

SAMUEL UKWUACHU, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE TENTH COURT OF APPEALS McLENNAN COUNTY

WALKER, J., announced the judgment of the Court and delivered an opinion in which ALCALA, RICHARDSON, and KEEL, JJ., joined. YEARY, J., filed a concurring opinion in which KELLER, P.J., and KEASLER, J., joined. NEWELL, J., filed a concurring opinion in which HERVEY, J., joined.

O P I N I O N

Appellant Samuel Ukwuachu was charged with and convicted of sexual assault. At trial, the State introduced into evidence some text messages between the victim and her friend that were sent around the time of the assault. Appellant's trial counsel sought to introduce into evidence earlier text messages from that same night between the victim and her friend, and the trial court held an *in camera* hearing pursuant to Texas Rule of Evidence 412, which governs evidence of previous sexual

conduct in criminal cases. At the hearing, the parties and their arguments at the hearing focused entirely on Rule 107, the Rule of Optional Completeness.[1] The trial court excluded the text messages that Appellant wanted to introduce into evidence.

The court of appeals reversed, finding that the messages were admissible under both Rule 412 and Rule 107 and the trial court abused its discretion by excluding them. After reviewing the relevant portions of the record, we hold that the trial court did not abuse its discretion and the court of appeals erred in holding otherwise. Accordingly, we reverse the decision of the court of appeals.

Preservation of Error

Preservation of error is a systemic requirement, and appellate courts, including this one, can and should consider the issue, regardless of whether the issue is raised by either of the parties. *Darcy v. State*, 488 S.W.3d 325, 327-28 (Tex. Crim. App. 2016). If an issue has not been properly preserved for appeal, neither the court of appeals nor this court should address the merits of that issue. *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009). Indeed, it is the duty of the appellate courts to ensure that a claim is preserved in the trial court before addressing its merits. *Wilson v. State*, 311 S.W.3d 452, 473 (Tex. Crim. App. 2010). To preserve a complaint that the trial court erred in excluding evidence that an appellant sought to introduce into evidence, the appellant must have articulated, in response to the opposing party's objection, the reason why he believed the evidence was admissible. *Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005). On appeal, the appellant must then comport his appellate ground with the reason he argued to the trial court that the evidence should have come in, and if the grounds do not comport with each other, the issue is not preserved for review. *See id.* at 179.

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[1] All references to rules are to the Texas Rules of Evidence unless otherwise indicated.

In this case, during what was initially supposed to be a Rule 412 hearing, the parties focused exclusively on whether the text messages were part of the same conversation or constituted different conversations, and, accordingly, whether they fell within Rule 107. Indeed, the parties specifically cited Rule 107 by number and by name.[2] At no point during the hearing did the parties discuss the requirements of Rule 412 or whether the evidence at issue fell within any of Rule 412's exceptions. Finally, other than a brief, single reference at the beginning of the hearing, the trial court never discussed Rule 412, and it considered the evidence only in terms of Rule 107.

The record is clear: Appellant sought to introduce the text messages under Rule 107, the State believed Appellant sought to introduce the text messages under Rule 107, and the trial court considered the text messages only in terms of Rule 107. The only ground preserved for appeal is whether the trial court erred under Rule 107. Rule 412 had no part in the discussion, Rule 412 was not preserved, and the court of appeals erred by holding the evidence was admissible under Rule 412.

Rule 107

The court of appeals also held that the trial court abused its discretion by not admitting the text messages under Rule 107. We begin with the rule itself, which states:

> Rule 107. Rule of Optional Completeness
>
> > If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. "Writing or recorded statement" includes a deposition.

TEX. R. EVID. 107. Under the plain language of the rule, there are two avenues to the admission of

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[2] Appellant's trial counsel also argued that the messages were admissible under Rule 106.

evidence. First, if a part of some evidence is introduced, any other part may be introduced so long as it is on the same subject. Second, other evidence–even evidence that is not a part of what has already been introduced–may be brought in if it is necessary to explain or help the trier of fact fully understand the part that was introduced. Under this second avenue, there is no requirement that the other part is on the same subject.[3] Thus, the questions in this case are whether the disputed text messages are part of the same conversation and are on the same subject, whether they are necessary to explain or allow the jury to fully understand the messages that were already introduced into evidence, or whether they fall into neither category and are not admissible under Rule 107.

Arguably, both parts of the text stream are within the same conversation, because a text message conversation can span a long period of time and the messages at issue in this case were all sent on the same night over what was, at most, a one hour and forty-five minute time period.[4] On the

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[3] However, in most cases it would have to be on the same subject in order to explain or help the trier of fact to fully understand the part offered by the opponent.

[4] At the *in camera* hearing, the victim testified:

Q So the first page I'm showing you begins at 2:16 a.m. And so are the, Are you okay, at that time. That's [friend] to you; is that correct?
A (Moving head up and down.)

Rep. R. vol. 6, 14.

MR. SIBLEY: I'm sorry, Judge.
Court's 1, that it starts at 2:16 a.m. on Sunday, October 20th.
A (Moving head up and down.)
Q (BY MR. SIBLEY) And if you could go through here to the end. Uh, is that all, um, on the same evening?
A Yes.
Q And that's all around the same time as the – you made these allegations against Mr. Ukwuachu?
A Yes.
Q Okay. And that's all a conversation with the same person?
A Yes.
Q Okay. Um, about what time do you believe, uh, that conversation ended?
A Um, 3:30, maybe 4:00.
Q 3:30. So about an hour and a half, or an hour and 15, or an hour and 45 minute period; is that

other hand, the earlier text messages that defense counsel sought to have admitted appear to be during a time when the victim was traveling with Appellant to Appellant's apartment, and the later text messages that the State introduced appear to be during the time that the victim was actually at Appellant's apartment, including the time after the assault occurred. This latter interpretation is the one that the trial court made during the hearing.[5]

A trial court's decision to admit or exclude evidence–an evidentiary ruling–is subject to the abuse of discretion standard of review. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). A court abuses its discretion if its decision lies outside the zone of reasonable disagreement. *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992).[6] The fact that there are two possible

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correct?
A Yes.

Rep. R. vol. 6, 20-21.

[5] At the *in camera* hearing, along with testimony from the victim, the text messages in question were printed out onto nine pages as Court's Exhibit 1 and given to the trial court to review, after which the trial court stated:

> THE COURT: Well, it appears to me that there are – or that there is a conversation on this text message that's been handed to me. A series of text messages, um, that covers the time period in which the alleged incident may or may not have occurred, but it's when the – it's when the incident was alleged to have occurred. And I see on the first three pages of this document it appears there are conversations about going over to – there's a reference – to, let's see, Sam, on the first page, and about what may occur or not occur, things like that. What – what won't occur, depending on whose position you read it from. Then after the first three pages, the fourth page of this series starts with, You okay, sent by the individual who's a party to this conversation. But then it appears that the witness sent a message that says, I want to go home, with, uh – uh, punctuation on there to indicate a – some sort of a distressed face. And then it's followed up with, Now. It's followed up with, I didn't drive. And it's followed up with, Can you come get me? And then it's followed up with, I don't want to be here. All by the person who sent these, which appears to be an entirely different conversation than the first one.
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> The first one's talking about going over, what's gonna happen, what's not gonna happen, potentially, what expectations are or aren't, things like that. And then we get into a whole 'nother conversation on Page 4 that's really more talking about wanting to leave.

Rep. R. vol. 6, 16-18.

[6] An abuse of discretion also occurs when a trial court's decision is arbitrary or unreasonable or if it is made without reference to any guiding rules or principles. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995); *Howell v. State*, 175 S.W.3d 786, 792 (Tex. Crim. App. 2005).

interpretations over whether the messages are part of one long conversation or two separate conversations strongly suggests that the trial court's determination that the text streams were separate was not an abuse of discretion. Because there are multiple, reasonable ways to interpret the text messages, clearly there is a zone of reasonable disagreement. The trial court's decision that the messages constituted two separate conversations is in the zone, and there cannot be an abuse of discretion by that choice.

Additionally, other acts, declarations, conversations, writings, or recorded instruments may be admissible under Rule 107, but such evidence must be necessary to explain or fully understand the part of the evidence that was already offered. TEX. R. EVID. 107 ("An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent.").

For example, in *Walters v. State*, the defendant shot his brother, who died from the injury. *Walters v. State*, 247 S.W.3d 204, 206 (Tex. Crim. App. 2007). Three calls were made to 9-1-1 relating to the shooting, and, at trial, the State played these three 9-1-1 calls in their entirety for the jury. *Id.* at 214-15. One of the calls was made by the defendant himself. *Id.* at 214. The 9-1-1 dispatcher, realizing that one of the callers was likely the shooter, made an outbound fourth call to the defendant. *Id.* at 215. During this second call between the dispatcher and the defendant, the defendant admitted that he shot his brother and explained that it was in self defense. *Id.* At trial, the dispatcher testified that he asked the defendant if he wanted to talk about what happened, but the State cut off the dispatcher at this point and redirected him to other matters. *Id.* Relying upon Rule 107, the defendant argued that the State created a false impression that he gave no answer to the

dispatcher's question,[7] and therefore he wanted to question the dispatcher about the full conversation or play the whole 9-1-1 call. *Id.* The trial court excluded the evidence. *Id.* at 215-16. We held that the exclusion of the second call was an abuse of discretion. *Id.* at 220. The State had created a false impression that the defendant gave no explanation of the shooting, but the excluded phone call clearly contained an explanation. *Id.* at 220-21. The evidence was thus necessary to fully and fairly explain the matter opened up by the State.

In this case, the court of appeals reviewed the contested text messages, found that they were part of an ongoing conversation and subject to Rule 107, and held that the trial court's determination that Rule 107 did not apply was an abuse of discretion and erroneous. The mere fact that a trial court decided a matter within its discretionary authority differently than an appellate court would have resolved the matter does not demonstrate an abuse. *Howell v. State*, 175 S.W.3d 786, 792 (Tex. Crim. App. 2005). Yet that appears to be exactly the basis for the court of appeals's decision below. The court of appeals failed to properly apply the abuse of discretion standard of review. Instead, the court of appeals applied a *de novo* review, disagreed with the trial court's ruling, and reversed. Additionally, the court of appeals did not consider whether the excluded text messages, which were arguably not a part of the same text message conversation as the messages introduced by the State, were necessary to explain what had already been admitted into evidence, as required by the second part of Rule 107. For that additional reason, the appellate court's decision to reverse the trial court's ruling was in error.

Conclusion

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[7] During closing argument, the State capitalized on the false impression and inaccurately asserted that the defendant never told the dispatcher that he shot his brother. *Walters*, 247 S.W.3d at 220.

In conclusion, the court of appeals erred in holding that the text messages were required to be admitted under Rule 412, because any claim of error based on Rule 412 was not preserved. The court of appeals also erred in holding that the text messages were required to be admitted under Rule 107, because it failed to deferentially apply the abuse of discretion standard of review. The decision of the court of appeals is reversed. We remand the cause to the court of appeals for further proceedings on Appellant's remaining points of error he raised on appeal.

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